Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

RICHARD DANIEL SHAFFETT

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

**Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a factual basis exist for a defendant's plea of guilty to a violation of the Endangered Species Act when the record lacks evidence showing that the item sold was actually a product of a protected species?

2. Can a guilty plea be intelligent and voluntary when it is based on a misrepresentation by the government that items seized from him were illegal?

3. Can a guilty plea be intelligent and voluntary when it is induced by threats that the defendant's wife and son will be prosecuted if he refuses the plea bargain?

LIST OF PARTIES

The parties to the proceeding below were Petitioner, Richard Daniel Shaffett, and Respondent, United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard Daniel Shaffett prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered within the proceeding on August 8, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (page 1a) was an unpublished opinion entered on August 8, 1996. A timely petition for rehearing was denied on September 4, 1996 (page 9a). The minute entry of judgment of the United States District Court for the Middle District of Louisiana was entered on July 12, 1995 (page 11a). The Supplemental Ruling on Motion of the district court (page 13a) was entered on July 14, 1995. The judgment of the district court is also unpublished.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (page 1a) was entered on August 8, 1996. A timely petition for rehearing was denied on September 4, 1996 (page 9a). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254.

STATUTES INVOLVED

STATUTES

16 U.S.C. 1538(a). 20a

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STATEMENT OF THE CASE

A. Facts of the Alleged Offense

Richard D. Shaffett is a 58 year-old man who has been in the real estate business in south Louisiana for over twenty-four years. He has no prior criminal record or experience with the criminal justice system.

Approximately five years ago Mr. Shaffett began to pursue his dream of establishing an alligator tannery in the state of Louisiana. He traveled to France in 1993 to employ a master tanner. While in France he came into contact with the representative of a Creations D.P., Paris, France, a company which sold handbags and other items made from the skins of alligators and crocodiles. The company asked Mr. Shaffett to distribute their products in the United States. Mr. Shaffett agreed but specifically requested that only alligator purses be sent to him by the company because of his unfamiliarity with crocodile products. ("Guilty Plea", Aug. 24, 1994, pp. 27-28; "Motion to Withdraw Guilty Plea", July 12, 1995, pp. 10-11).

Nevertheless, when the products entered this country some of them were made from crocodile skins. Those that were made of crocodile skins entered the country as New Guinea crocodiles, which are not listed as endangered under 50 C.F.R. 17.11 or as CITES Appendix I in 50 C.F.R. 23.23(f). The shipments, made between November, 1991 and December, 1992, were seized from Mr. Shaffett's business

in June, 1993. Over forty items were sent to be examined by a government expert in the field of crocodile skin identification, Dr. Wayne King. Dr. King identified the skins of three of the forty items as belonging to the Nile crocodile (Crocodylus niloticus) and the African slender-snouted crocodile (Crocodylus cataphractus), both species of which can be either legal or illegal depending upon the country of origin.

B. Course of Proceedings

On June 29, 1994, Shaffett was charged in an Indictment, as follows:

> Count 1 -- knowingly facilitating the transportation, concealment, and sale of seven handbags made from crocodile skin - knowing that said merchandise had been imported contrary to law, in violation of 18 U.S.C. 545;
>
> Count 2 -- knowingly and unlawfully receiving in foreign commerce within the course of a commercial activity, two handbags made from the skin of the Nile crocodile (Crocodylus niloticus), an endangered species, in violation of 16 U.S.C. 1538(a)(1)(E);
>
> Count 3 -- knowingly and unlawfully receiving in foreign commerce within the course of a commercial activity, one handbag made from the skin of the Nile crocodile (Crocodylus niloticus), an endangered species, in violation of 16 U.S.C. 1538(a)(1)(E);
>
> Count 4 -- knowingly engaging in

conduct involving the sale of wildlife having a market value in excess of $350.00, a handbag manufactured from the skin of the African slender-snouted crocodile (Crocodylus cataphractus), by transporting said wildlife, knowing that it had been taken, possessed, transported, and sold in violation of or in a manner contrary to the laws of the United States, in violation of 16 U.S.C. 3372(a)(1) and 3373(d)(1)(b);

Count 5 -- knowingly and unlawfully selling in interstate commerce a handbag made from the skin of an African slender-snouted crocodile (Crocodylus cataphractus), an endangered species, in violation of 16 U.S.C. 1538(a)(1)(F).

Count 1 was punishable by fine of not more than $10,000 or imprisonment of not more than five years, or both. 18 U.S.C. 545. Counts 2, 3 and 5 were each punishable by fine of not more than $50,000 or imprisonment for not more than one year, or both. 16 U.S.C. 1540(b). Count 4 was punishable by fine of not more than $20,000 or imprisonment for not more than five years, or both. 16 U.S.C. 3373(d).

Mr. Shaffett was arraigned on July 6, 1994. Shaffett tried to locate an expert to examine the purses to ensure that they were, in fact, manufactured from the skins of endangered crocodiles, but failed because there are only five persons in the world qualified enough to make such a determination. ("Guilty Plea, Aug. 24,

1994, p. 30). On August 11, 1994, his attorney was notified that a jury trial was set for September 1, 1994. Shaffett and his family were requested to come to the U.S. Attorney's Office for a discussion. This meeting took place with three Assistant U.S. Attorneys, and Mr. Shaffett was advised of possible consequences if he did not agree to a plea agreement.

The result of this meeting was that Shaffett agreed to a plea bargain, and on August 23, 1994, a Bill of Information was filed, charging Shaffett as follows:

> Count 1 -- knowingly and unlawfully receiving in foreign commerce three handbags made from the skin of the Nile crocodile (Crocodylus niloticus), an endangered species, in violation of 16 U.S.C. 1538(a)(1)(E) and 1540(b);
>
> Count 2 -- knowingly and unlawfully selling in interstate commerce a handbag made from the skin of the African slender-snouted crocodile (Crocodylus cataphractus), in violation of 16 U.S.C. 1538(a)(1)(F) and 1540(b); and
>
> Count 3 -- knowingly engaging in conduct involving the sale of a purse made from the skin of the African slender-snouted crocodile (Crocodylus cataphractus) when he should have known it had been possessed, transported and sold in violation of 16 U.S.C. 1538(c)(1) and 50 C.F.R. 23.12(a)(1)(i).

On August 24, 1994, Shaffett pleaded guilty to the Bill of Information pursuant to a plea agreement. On three occasions at the hearing on the guilty plea, Shaffett stated that he was not aware that he had committed any illegal acts. ("Guilty Plea", Aug. 24, 1994, p. 28-30).

In support of the plea, the government offered testimony of Special Agent John Collins of the U.S. Fish and Wildlife Service. Agent Collins testified that the purses in question were made from the skin of the African slender-snouted crocodile (Crocodylus cataphractus) and the Nile Crocodile (Crocodylus niloticus); his testimony was based on Dr. King's report. ("Guilty Plea", Aug. 24, 1994, p. 20, 25). However, Agent Collins broadened the results of the Dr. King's report by stating that all African slender-snouted crocodiles were illegal when in fact all African slender-snouted crocodiles are not illegal. ("Guilty Plea", Aug. 24, 1994, p. 21).

On November 4, 1994, Shaffett was sentenced to a three year term of probation to be served under Counts 1, 2 and 3. The court ordered that these terms of probation were to run concurrently with each other. As a condition of the probation, Shaffett was ordered to reside at the Ecumenical House, 1328 North Street, Baton Rouge, Louisiana, for a period of six months, pay a fine of $3,000.00 and surrender to the government all of the remaining legal handbags.

After sentencing Shaffett located an expert to examine the purses and retained

present counsel who, on February 17, 1995, filed a motion to produce the handbags forming the basis of the counts in the Bill of Information. On March 23, 1995, the court granted Shaffett's motion, ordering that the purses be examined by and expert chosen by the defense.

The purses were examined by Dr. Karlheinz Fuchs, and his report was submitted to the court on March 31, 1995. Dr. Fuchs determined that the handbags in Count 1 (purse nos. 1450, 1293, 1176) were actually made from the skins of Crocodylus novaeguineae, a CITES Appendix II crocodile that is not endangered (50 C.F.R. 23.23(f), 17.11). Dr. Fuchs further determined that the handbag in Counts 2 and 3 (purse no. 867) was made from the skins of Crocodylus cataphractus congicus, also a CITES Appendix II crocodile (50 C.F.R 23.23(f)).

On April 19, 1995, Shaffett filed a motion under 28 U.S.C. 2255 to withdraw his guilty pleas for the following reasons: an insufficient factual basis existed for the court's finding that he committed the charged offenses; the guilty pleas were not intelligent and voluntary in that they were based on the government's misrepresentation to him that the purses were produced from skins of endangered crocodiles; the guilty pleas were not voluntary in that Shaffett's wife and son had been threatened by the government with prosecution if he did not plead. The district court denied Shaffett's motion, and the Fifth Circuit Court of Appeals affirmed the decision of the district court.

REASONS FOR GRANTING THE WRIT

I. THE PLEA OF GUILTY TO "COUNT 3" OF THE BILL OF INFORMATION LACKED THE FACTUAL BASIS REQUIRED BY RULE 11(f) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Shaffett pleaded guilty to a violation of 16 U.S.C. Secs. 3372(a), 3373(d)(2) for his involvement in the sale of a handbag (purse no. 867) made from, what he thought based on the government's misrepresentations, a CITES Appendix I species. That guilty plea lacked the factual basis required by Rule 11(f) of the Federal Rules of Criminal Procedure because the report of the government's expert in the field of crocodile skin identification does not state that the handbag was manufactured with the skins of endangered crocodiles. Dr. King's report does not state that any of the purses in question were made from the skins of CITES Appendix I crocodiles. That assumption was made by Special Agent Collins who was not qualified to make that determination.

A court cannot accept a plea of guilty unless it is satisfied that there is a sufficient factual basis for the plea. The factual basis must appear in the record and must be sufficiently specific to allow the court to determine that the defendant's conduct was within the ambit of that defined as criminal. United States v. Oberski, 734 F.2d 1030, 1031 (5th Cir. 1984); United States v. Armstrong, 951 F.2d 656 (5th Cir. 1992). The record must reveal specific factual allegations supporting each element of the

offense. United States v. Adams, 961 F.2d 505, 508 (5th Cir. 1992).

In finding that a factual basis existed for the Shaffett's plea, this Fifth Circuit cited testimony from U.S. Fish and Wildlife Special Agent John Collins who testified that the slender-snouted crocodile was endangered. However, the Fifth Circuit overlooked the testimony of Collins that the U.S. Fish and Wildlife Service submits its seizures to an expert for unquestionable identity and that Collins testimony was based on the findings of this expert. ("Guilty Plea", Aug. 24, 1994, p. 25).

Furthermore, the Fifth Circuit mistakenly interpreted the reports of the government's expert and Shaffett's expert as being a difference of opinion. (page 7a). Actually, the two reports are consistent. The government's expert, Dr. Wayne King, identified the purse only as being made from Crocodylus cataphractus (Report of Dr. Wayne King, July 18, 1993, pp. 1-6). Dr. King rendered no opinion as to whether said purse was made from skin of an endangered Crocodylus cataphractus (CITES Appendix I) or of Crocodylus cataphractus congicus, which is CITES Appendix II. (50 C.F.R 23.23(f)). Shaffett's expert Karlheinz Fuchs identified the handbag (purse no. 867) as being made from the skin of Crocodylus cataphractus congicus, a CITES Appendix II species (Report of Dr. Karlheinz Fuchs, April 5, 1995, p. 1). Handbags from this sub-species can be sold legally and without an import permit. 50 C.F.R. 23.12(a)(2).

Shaffett urges that since Collins' testimony was based on Dr. King's report which does not state whether the handbag (purse no. 867) was made from the skin of a CITES Appendix I Crocodylus cataphractus, there is no factual basis for his plea and that he should be allowed to withdraw it.

II. THE GUILTY PLEAS WERE NOT VOLUNTARY AND INTELLIGENT BECAUSE THEY WERE INDUCED BY THREATS AND MISREPRESENTATIONS BY THE GOVERNMENT THAT THE HANDBAGS WERE ILLEGAL.

Shaffett further urges that he should be allowed to withdraw his plea of guilty to Counts 1, 2, and 3 of the Bill of Information because the pleas were based on threats made by the government and misrepresentations by the government that the purses were illegal.

A. Shaffett's guilty pleas were induced by misrepresentations by the government that the handbags were made from the skins of endangered crocodiles.

Each of the four handbags imported into the United States by Shaffett entered the country as CITES Appendix II, New Guinea crocodile (Crocodylus novaeguineae) purses. As such, they were only required to have a valid foreign export permit in order to clear United States Customs. 50 C.F.R. 23.12(a). The manufacturer of the purses, Creations D.P., Paris, France, obtained the export permit, and the purses were examined and cleared by United States Customs. On at least one shipment, each

individual purse was examined by United States Customs before being cleared. ("Guilty Plea", Aug. 24, 1994, p. 28).

Shaffett had no indication that the purses may have been manufactured from the skins of endangered crocodiles until his arrest. The government's expert in the field of crocodile skin identification, Dr. Wayne King, identified the skins of most of these items as New Guinea crocodiles and some as belonging to the Nile crocodile (Crocodylus niloticus) and the African slender-snouted crocodile (Crocodylus cataphractus).

Shaffett was indicted on June 29, 1994 and arraigned on July 6, 1994. On August 11, 1994, Shaffett's attorney was notified that trial was set for September 1, 1994. Shaffett tried to locate an expert to examine the purses to ensure that they were, in fact, manufactured from the skins of endangered crocodiles, but failed because there are only five persons in the world qualified enough to make such a determination. ("Guilty Plea, Aug. 24, 1994, p. 30).

Unable to locate an expert, Shaffett was offered a plea bargain by the government a few days before trial. Shaffett was given the opportunity to plead to misdemeanors rather than be tried for felonies. Shaffett accepted the offer only because of the assurances of the government that the purses were produced from the skins of endangered crocodiles and because he was unable to hire his own expert in sufficient time prior to trial.

Only after Shaffett's plea was he able to locate another expert to examine the purses, Karlheinz Fuchs. Mr. Fuchs determined that three of the allegedly illegal handbags were actually made from the skins of New Guinea crocodiles (Crocodylus novaeguineae), just as represented on the import documents, while the other purse was made from the skin of an African slender-snouted crocodile, Congo subspecies (Crocodylus cataphractus congicus). (Report of Dr. Karlheinz Fuchs, April 5, 1995, pp. 1-2).

Since Mr. Shaffett was forced to make a decision on accepting a plea bargain or going to trial without the benefit of another expert's examination, his plea of guilty was not an informed decision but a hurried decision made on the assurances of the government that the handbags in question were made from the skins of illegally-imported crocodiles. Shaffett would not have pleaded guilty if he could have found an expert to examine the purses. He also testified that he would not have pleaded guilty if he had information that suggested the handbags were made from the skins of CITES Appendix II crocodiles. ("Motion to Withdraw Guilty Plea", July 12, 1995, pp. 15-16). Moreover, Shaffett asserted his innocence three times during the guilty plea hearing:

> They came in as New Guinea crocodiles and passed everything they should pass legally. I had no idea that I had illegal purses at all. ("Guilty Plea", Aug. 24, 1994, p. 28);

> And if there is anything illegal, Sir, I knew nothing about it. ("Guilty Plea", Aug. 24, 1994, p. 29);
>
> I didn't know they were illegal crocodiles. Certainly, I knew they were crocodile, there's only five men in the world can tell one crocodile from another, from there own research, and I'm not an expert of that sort. ("Guilty Plea", Aug. 24, 1994, p. 30).

The law is clear that a guilty plea should be vacated if the defendant's representations at the time his guilty plea was accepted were the product of such factors as misunderstanding, duress or misrepresentations so as to render his guilty plea a constitutionally inadequate basis for imprisonment. Blackledge v. Allison, 431 U.S. 63, 74-75, 97 S.Ct. 1621, 1629 (1977). In this case, Shaffett had no guilty knowledge or intent. He accepted the items after a United States government agency cleared the items for import; then he pleaded guilty only because another government agency assured him that four of the items were in fact illegally imported.

B. Shaffett's guilty pleas were induced by threats by the government that his wife and son would be prosecuted if he refused the plea bargain.

Shaffett intended to show at his hearing on the Motion to Withdraw Guilty

Plea that his wife and son had been threatened with prosecution if he did not plead. After calling a United States Attorney to testify with respect to these threats, Shaffett received chilling words from the presiding judge:

> At the time, Mr. Shaffett entered his plea of guilty, he was placed under oath in this courtroom, and I personally asked Mr. Shaffett whether anybody had threatened him or forced him to enter this plea of guilty. Under oath, he, and the transcript so states it -- as a matter of fact, I think it's attached to -- a part of it is attached to your memorandum. Under oath, he stated, "No, sir. Yes, sir, I'm sure." That's perjury, which is not a nominal misdemeanor. It's a felony.
>
> Now, of course, Mr. Shaffett has not so testified about any threat here today, but if he does, he is certainly sitting on the edge of an indictment for perjury, so maybe you want to rethink whether you want to pursue this particular matter, or this particular facet of the matter. ("Motion to Withdraw Guilty Plea", July 12, 1995, p. 4).

After hearing these comments from the court and surmising the attitude the Court evidently held regarding receiving this testimony, Mr. Shaffett decided not to

pursue this testimony.

At the guilty plea hearing, the court noted that Shaffett hesitated when asked if he had been threatened to enter the guilty pleas:

> THE COURT: Has anybody threatened you, Mr. Shaffett, or forced you to enter these pleas of guilty?
>
> MR. SHAFFETT: No.
>
> THE COURT: You hesitated. Are you not sure?
>
> MR. SHAFFETT: No, sir. Yes sir, I'm sure. I'm sorry. ("Guilty Plea", Aug. 24, 1994, p. 16).

It is obvious from this dialogue that Mr. Shaffett was considering the comments made to him by the U. S. Attorney. The fear of the consequences of the threat obviously weighed upon Mr. Shaffett's mind and the voluntariness of his plea.

As the Tenth Circuit stated in United States v. Wright, 43 F.3d 491, 498 (10th Cir. 1994),

> If the defendant had been coerced into accepting his plea to protect his wife, he could not be expected to openly challenge that very arrangement as unlawful while his wife was still vulnerable. In other words, the coercion that formed the basis of his claim deterred him from raising that argument

> until his wife was out of harm's way.

See also United States v. Pollard, 959 F.2d 1011 (D.C. Cir.), cert denied 113 S.Ct. 322 (1992).

In the context of the special circumstances surrounding Mr. Shaffett's plea namely: the questionable identification of the crocodile skins; Mr. Shaffett's resolute denial of illegal actions; and his former attorney's assertions that the purses were not available for a defense expert's examination until after the plea of guilty, it was even more crucial that the Court hear this evidence without imposing the additional threat to Mr. Shaffett of a possible felony conviction if he attempted to produce evidence of the threats.

A plea agreement entailing lenity to third persons imposes a special responsibility on the district court to ascertain the plea's voluntariness due to its coercive potential. United States v. Whalen, 976 F.2d 1346, 1348 (10th Cir. 1992). Instead of frightening the defendant into withdrawing his attempt to introduce evidence of these threats, the court should have received the evidence to properly evaluate defendant's assertion that his guilty plea was not voluntary. It is a matter of importance to the integrity of our criminal justice system that guilty pleas be knowing and intelligent and any claims reasonably questioning the voluntariness of a plea should be entertained and not threatened.

III. SHAFFETT'S CONVICTIONS AND THE CIRCUMSTANCES SURROUNDING THE PLEA AGREEMENT OFFEND THE BASIC NOTIONS OF JUSTICE AND FAIR PLAY EMBODIED IN THE DUE PROCESS CLAUSE.

The district court accepted the defendant's plea despite his three-time denial of any knowledge of an illegal act. The judge explained that because the statute "under which Mr. Shaffett has been convicted, is an offense of general intent, and knowledge that the wild thing possessed was a particular endangered, threatened or other list, is not required." ("Motion to Withdraw Guilty Plea", July 12, 1995, pp. 10-11).

The knowledge required by 16 U.S.C. 1538(a)(1)(G) was discussed in the case of United States v. Onge, 676 F.Supp. 1045 (D.Or. 1987). In that case the defendant believed he was shooting at an elk but actually shot a grizzly bear, a threatened species of wildlife. The court found that "knowingly" is clearly an element of the offense but that the intent required is only general intent and did not require that Onge actually know he was shooting a grizzly bear. See also United States v. Ivey, 949 F.2d 759 (5th Cir. 1991). The court in Onge concluded that to prove its case the government must prove three elements beyond a reasonable doubt in order for the defendant to be convicted: first, that the defendant knowingly took an animal within the United States; second, that the animal was a grizzly bear; and third, that the defendant did not have permission from the United States Department of the Interior to take the

bear.

In our case, only the first of the three elements is present. Shaffett did take the items into the United States but he did so only after the United States Customs Office cleared the items for import. He did not know one crocodile skin from another but relied on the expertise of the government agency responsible for detecting illegal imports. This is not a case where subterfuge or concealment was used to attempt to sneak illegal handbags into this country. The handbags came in with proper documentation and went through regular customs screening. Shaffett accepted the handbags once they cleared customs with full faith that the handbags were perfectly legal. It was not until a year later that he was arrested and assured by the prosecuting officials that a few of these purses were not legal. Once again he accepted the government's claim and pleaded guilty although he remained firm in his denial of knowingly committing an illegal act. He has now learned after hiring his own expert that the handbags were made from crocodiles that may be legally imported into this country.

As stated in United States v. Briggs, 939 F.2d 222, 228 (5th Cir. 1991),

> Simply put, to convict someone of a crime on the basis of conduct that does not constitute the crime offends the basic notions of justice and fair play embodied in the Constitution.

There was nothing criminal about Shaffett's conduct. His mistake was his reliance on either conduct by the United States Customs Office in clearing the purses for import, or assurances by the U.S. Attorney that some of the purses were illegal.

CONCLUSION AND PRAYER

The plea of guilty in this case was not intelligently made by an informed defendant, and there are reasons to question the accuracy of reliability of the defendant's admission that he had committed the crime with which he had been charged.

This cause should be remanded to the trial court for the Appellant to replead.

Respectfully submitted,

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APPENDIX A

Filed August 8, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-30743

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

RICHARD DANIEL SHAFFETT,
Defendant-Appellant

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE
DISTRICT OF LOUISIANA

(CR-95-25-A)

Before BENAVIDES, STEWART and DENNIS, Circuit Judges.

CARL E. STEWART, Circuit Judge:[1]

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[1] Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not

Shaffett was convicted after a guilty plea of misdemeanor violations of the Endangered Species Act and the Lacey Act for importing and selling four handbags made from the skins of two species of endangered African crocodiles. Based on his own expert's report that put into question the government's identification of the crocodile skins, Shaffett moved to withdraw his guilty plea. The district court denied his motion, and Shaffett appeals. Finding no clear error, we AFFIRM.

FACTS

Shaffett owns an alligator tanning business and also acted as a distributor for an French company, Creations D.P., which manufactures handbags and other items made from crocodile, alligator, and other reptile skins. Certain items were seized from his business in June 1993 and were examined by a government expert in the field of crocodile skin identification. Another handbag was purchased and examined by an undercover agent for U.S. Fish and Wildlife Service.

As a result of these examinations, Richard Shaffett was originally charged with two felonies, one under the Lacey Act and one under the smuggling act, based on allegations that the seized items were

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precedent except under the limited circumstances set forth in Local Rule 47.5.4.

made from endangered species. Shaffett entered into a plea agreement, whereby he agreed to plead guilty to a superseding bill of information charging him with (1) knowing receipt in foreign commerce of three handbags made from the skin of the Nile Crocodile, a violation of the Endangered Species Act, 16 U.S.C. 1538(a)(E), 1540(b); (2) knowing and unlawful sale in interstate commerce of a handbag made from the skin of the African slender-snouted Crocodile, another violation of the Endangered Species Act, 16 U.S.C. 1538(a)(1)(F), 1540(b); and (3) sale of a purse made from the skin of the African slender-snouted Crocodile which he knew or should have known had been possessed, transported or sold in violation of the Lacey Act, 16 U.S.C. 3372(a), 3373(d)(2).

After he was sentenced to three years' probation with a special condition that he reside at The Ecumenical House for six months and pay a $3,000 fine, Shaffett moved for and received permission to have the contraband handbags examined by his own expert. Following the examination, Shaffett moved to withdraw his guilty plea, arguing that his expert had found that the count 1 purses were not from the Nile crocodile, but from a another species that is not listed as endangered, and alleging that the fourth handbag referred to in Counts 2 and 3 was made from a subspecies of the African slender-snouted crocodile that is legal to import under the provisions of the Lacey Act, provided its importation is accompanied by proper

identification. Shaffett contends that there was no factual basis for the plea sufficient to show that the conduct would constitute the criminal offense charged. He argues that this lack of factual basis affects the voluntariness of the plea because the plea was based on the Government's misrepresentation that a crime had been committed, when in fact no crime had beer committed. Shaffett also contends that he was coerced into the guilty plea by threats from a Government attorney.

DISCUSSION

"The plea of guilty is a solemn act not to be disregarded because of belated misgivings about [its] wisdom." United States v. Fitzhugh, 78 F.3d 1326, 1328 (8th Cir. 1996)(citing United States v. Morrison, 967 F.2d 264, 268 (8th Cir. 1992). In accord with Fed. R. Crim. P. 32(d), a court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason, but a defendant does not have an absolute right to withdraw his guilty plea, and the decision to allow him to do so is within the sound discretion of the trial court. United States v. Nash, 29 F.3d 1195, 1198 (7th Cir. 1994)(citations omitted). When a defendant enters a guilty plea, the sentencing court must satisfy itself, through an inquiry of the defendant or examination of the relevant materials in the record, that an adequate factual basis exists for the elements of the offense, in accord with the dictates of Federal Rule

of Criminal Procedure 11(f). United States v. Adams, 961 F.2d 505, 508 (5th Cir. 1992) (citation omitted). The record must reveal specific factual allegations supporting each element of the offense. Adams, 961 F.2d at 508. The acceptance of a guilty plea is deemed a factual finding that there is an adequate factual basis for the plea, and we review this finding under the clearly erroneous standard. Id.: United States v. Rivas, ___F.3d___, 1996 WL 284972, *1 (5th cir. 1996).

The Nile crocodile and the African slender-snouted crocodile are both listed as protected by the Endangered Species Act. 50 C.F.R. 17.11(h). Thus, it is unlawful for any person subject to the jurisdiction of the United States to deliver, receive, carry, transport, or ship in interstate or foreign commerce either species, and it is unlawful for any person to sell or offer for sale either species in interstate or foreign commerce. 16 U.S.C. 1538(a)(1)(E),(F). Furthermore, under the Lacey Act, it is unlawful for any person to illegally transport, sell, receive, acquire, or purchase any species listed as covered by the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), to which the United States is a signatory, 16 U.S.C. 3372(a). The African slender-snouted crocodile is on the CITES list, though one subspecies may be transported if properly documented. 50 C.F.R. 23.23.

The factual basis for the guilty plea was based on testimony given at the plea

hearing by U.S. Fish and Wildlife Special Agent John Collins. Collins testified that both the Nile River crocodile and the slender-snouted crocodile were endangered species. He also testified that the African slender-snouted crocodile is listed in the appendices to the CITES Treaty, which means that a permit from the U.S. Department of the Interior is required before articles made from this particular species can be imported, and that the Department of the Interior did not issue any such permits to Shaffett. In testifying that the three handbags listed in Count 1 were made from the skin of Nile River crocodiles, Collins relied on a report prepared by Dr. Wayne King, a professor of herpetology at the University of Florida. (Herpetology is the branch of zoology dealing with reptiles and amphibians.) Dr. King's impressive Curriculum Vitae had been made part of the record at the time the court considered Shaffett's guilty plea. Collins testified that the handbag listed in Counts 2 and 3 was identified as being African slender-snouted crocodile by and unnamed undercover agent.

Shaffett alleges that the skins were misidentified by the government and that therefore there was no factual basis for the plea. In his motion, Shaffett argued that his expert, Karlheinz Fuchs, had found that the three Count 1 purses were made from the skins of New Guinea crocodiles, a species not listed as endangered, and that the fourth handbag was made from the African slender-snouted

crocodile, did question the identification methodology employed by Collins in the courtroom and apparently relied on by the undercover filed agent. Shaffett admitted that identification of the origin of a crocodile skin is highly specialized, and testified that only five people in the world are expert enough to distinguish the various species and subspecies.

The legislative history of the Endangered Species Act shows that Congress intended to make violations of its provisions a general intent crime, and no specific intent to possess an endangered animal product is necessary. See United States v. Nguyen, 916 F. 2d 1016, 1018-19 (5th Cir. 1990). Thus, the only element necessary to show a violation of the act is a generalized knowledge of possession of the animal product in question. It is not necessary to know that the animal product is from a protected species or subspecies, and the government need not prove that the possessor knew that the product was from a threatened species or that he knew that it was illegal to transport, import, or sell it. See Nguyen, 916 F. 2d at 1018. Shaffett admitted at the plea hearing that he knew the purses were made from crocodile skin. Given the highly specialized identification process acknowledged by Shaffett, it would not be unexpected that experts might disagree in their conclusions about the skins in question. The fact that Shaffett can point to a difference of opinion between experts does not automatically render his guilty plea

infirm. Our review of the record satisfies us that the district court established an adequate factual basis for each element of the offenses charged. Consequently we reject Shaffett's claims to the contrary.

Shaffett also argues that his plea was involuntary because it was induced by a threat made by a United States Department of Justice attorney. Shaffett sought to introduce evidence of the threat at the hearing on the motion to withdraw the plea, but decided not to pursue the argument on the advice of the district court. Because Shaffett declined to pursue the issue, he is deemed to have waived it.

As the trial court did not make any clear error in finding an adequate factual basis for the guilty plea in accord with Federal Rule of Criminal Procedure 11(f), and Shaffett waived any argument that his plea was induced by a threat, the district court did not abuse its discretion in denying Shaffett's motion to withdraw his guilty plea. Accordingly, the district court's decision is AFFIRMED.

Filed September 4, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-30743

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

RICHARD DANIEL SHAFFETT,
Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA, BATON ROUGE

ON PETITION FOR REHEARING

(September 4, 1996)

Before BENAVIDES, STEWART and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/ Carl E. Stewart
United States Circuit Judge

Filed July 12, 1995

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY
JULY 12, 1995
PARKER, CJ.

UNITED STATES OF AMERICA CRIMINAL

VERSUS

RICHARD DANIEL SHAFFETT NO. 94-25-A-M1
(ALSO KNOWN AS "DICKIE")

This matter came on this day for hearing on the defendant's motion to set aside his conviction.

PRESENT: Robert W. Piedrahita
Randall B. Miller
Assistant U.S. Attorneys

Cyrus J. Greco
Alton T. Moran
Counsel for defendant

The defendant's exhibits Shaffett #1 thru Shaffett #4 are filed into the record.

The defendant moves for sequestration of the witnesses.

Richard D. Shaffett is sworn and testifies.

John Collins is sworn and testifies on behalf of the Government.

The parties present argument.

For oral reasons given, the Court DENIES the defendant's motion to set aside his conviction.

* * * *

/s/ JP

Rayborn/rep.

Filed July 14, 1995

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

CRIMINAL ACTION

VERSUS

NO. 94-25-A

RICHARD DANIEL SHAFFETT

SUPPLEMENTAL RULING ON MOTION

At the conclusion of the evidentiary hearing held on July 12, 1995, the court denied defendant's motion to withdraw his guilty plea. The court now supplements the oral reasons stated in court.

On August 24, 1994, defendant, Richard Shaffett, pleaded guilty to a three count superseding bill of information. Count one essentially charges defendant with knowingly and unlawfully receiving in foreign commerce three specific handbags made from the skin of the Nile Crocodile, an endangered species, in violation of 16 USC 1538(a)(1)(E). Count two charges defendant with knowingly and unlawfully selling in interstate commerce a certain handbag made from the skin of an African Slender Snouted Crocodile in violation of 16 USC 1538 (a)(1)(F).

Count three basically charges defendant with a violation of 16 USC 3372 (a)(1) by knowingly engaging in conduct

involving the sale of a purse made from the skin of an African Slender Snouted Crocodile when he should have known that it had been possessed, transported and sold in violation of 16 USC 1538(c)(1) and 50 CFR 23.12(a)(1)(i). In other words, the bill of information alleges that defendant should have known that the purse had been possessed, transported and sold in violation of the Convention on International Trade and Endangered Species (CITES) and the regulation requiring an United States import permit and a foreign export permit or re-export certificate for wildlife listed in the CITES Appendix I.

Defendant contends that he should be allowed to withdraw his plea because the government failed to present a complete and accurate factual basis for the plea. defendant presents his own "expert report" purportedly establishing that the handbags identified in count one were all Crocodylus novaeguineae, listed on CITES Appendix II. Based on this, defendant contends it was legal to import the purses without an import permit, citing 50 CFR 23.12.

Defendant further contends that the "expert report" additionally establishes that the handbag identified in counts two and three was made from a Crocodylus cataphractus congicus, which is also an Appendix II crocodile. Defendant argues that under the CITES regulations he legally sold the purse involved in counts two and three without a United States permit.

The government relies on an expert report and the testimony of its case agent, which basically establishes that the purses involved in all three counts are made from skins of endangered or threatened crocodiles. The government argues that defendant has the burden of proving the plea was unjust. According to the government, defendant cannot meet his burden of proof without submitting evidence that the purses were imported with appropriate paperwork, including any necessary import and export permits.

After hearing closing arguments, the court ruled in favor of the government finding that defendant had failed to show any miscarriage of justice. The court found that defendant's expert merely questions the opinions reached by the government's expert. Consequently, the court found that defendant had failed to demonstrate any constitutional error to support his 2255 motion. To further explain, the court issues these supplemental reasons.

The government submitted evidence at the guilty plea establishing that the purses involved in count one were all made from Nile Crocodile skins. The Nile Crocodile or Crocodylus niloticus has long been listed on the "List of Endangered and Threatened Wildlife", 50 CFR 17.11. Testimony from the government case agent further established that the purse was received in foreign commerce in the course of a commercial activity. Defendant's acknowledgement that he knew it was a

crocodile was sufficient to establish the general intent requirement of 16 USC 1538. U.S. v. Nguyen, 916 F.2d 1016 (5th Cir. 1990).

Defendant's contention that the government had to go further and show that the Nile crocodile was not a CITES Appendix II crocodile lacks merit. The fact that the CITES regulations require United States import permits for Appendix I wildlife but not Appendix II wildlife is irrelevant. Endangered and threatened species that are listed in the CITES Appendices are additionally subject to the regulations for endangered and threatened species. 50 CFR Part 17, see in particular, 23.2, 23.13(a).

In other words, the Endangered Species Act and regulations in Part 17 impose additional prohibitions and permit requirements beyond that required by CITES in Part 23. U.S. v. Stubbs, 11 F.3d 632, 637 (6th Cir. 1993). The regulations for endangered and threatened species provide very narrow instances where Nile Crocodiles may be imported, none of which have any application to the case at hand. 50 CFR 17.42(c).

Moreover, the fact that defendant's expert reaches a different opinion, that the purses in count one were made from New Guinea Crocodiles, which are not on the endangered and threatened list, is at most an attack on the factual basis presented by the government at the guilty plea hearing. This does not constitute

constitutional error rendering the plea invalid. The factual basis established by the government at the time of the guilty plea was sufficient to show a violation of 1538(a)(1)(E). This is enough to satisfy the basic notions of justice and fair play embodied in the Constitution. See, U.S. v. Briggs, 939 F.2d 222 (5th Cir. 1991). Consequently, the 2255 motion must be denied in this respect.

For much the same reasons, the court finds that the government established a factual basis for counts two and three at the guilty plea. There was evidence that defendant sold a purse model 867 to an undercover agent in interstate commerce. That purse was made from an African Slender Snouted Crocodile. The African Slender Snouted Crocodile has long been listed as an endangered species and therefore subject to the general prohibitions against selling endangered wildlife in interstate commerce. See 50 CFR 17.11, 17.21. Defendant does not claim any exemption or special permit under Part 17 that would allow him to sell the purse at issue.

Whether the purse was made from a Crocodylus cataphractus congicus, as defendant's expert contends, is relevant only for purposes of CITES. The allegations in count two do not involve the CITES regulations in any way. Consequently, defendant's argument clearly has no merit with respect to count two.

The allegations in count three do

refer indirectly to CITES Appendix I. That is, defendant is charged with a violation of 16 USC 3372(a)(1) on the basis that he knowingly sold a purse made from an African Slender Snouted Crocodile that he should have known had been possessed, transported or sold in violation of a law or regulation of the United States, to wit: 16 USC 1538(c)(1) (making it unlawful to engage in trade in violation of CITES) and 50 CFR 23.12 (a)(1)(i) (requiring import and expert permits to import CITES Appendix I wildlife).

However, this too is ultimately a factual challenge to the opinion of the government's expert. In his opinion, the purse was made from an African Slender Snouted Crocodile, Crocodylus cataphractus, which is a CITES Appendix I crocodile. Defendant's expert indicates that purse no. 867 is made from a Crocodylus cataphractus congicus but offers no explanation to support his conclusion that it came from the Congo population.

Moreover, the government persuasively argues that defendant bears the burden of demonstrating that the plea was unjust. Defendant has failed to establish that any import or export permits (or re-export certificates) were obtained. The gist of defendant's testimony is that he thought the skins were "legal" because they made it through customs. The testimony of the government's case agent establishes that illegal skins often make their way through

customs due to the number of wildlife goods passing through and the relatively few inspectors available to make inspections.

At his guilty plea, defendant indicates that he knew that some of the purses were made from crocodile skins when he first obtained them. Transcript at p. 29. He also indicates he was well aware of the CITES permit requirements. Defendant cannot reasonably rely on the fact that the purse made its way through customs. In short, the court finds that the government presented a sufficient factual basis for the plea as to all counts and that defendant has failed to demonstrate that a manifest injustice has occurred.

Accordingly, the motion by defendant to withdraw his guilty plea pursuant to 28 USC 2255 is hereby DENIED for the oral reasons assigned in court as supplemented by this opinion.

Baton Rouge, Louisiana, July 14, 1995.

/s/ John Parker
John V. Parker, Chief Judge
Middle District of Louisiana

16 U.S.C. 1538. Prohibited acts

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to --

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever and in the course of commercial activity, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(c) Violation of Convention

(1) It is unlawful for any person subject to the jurisdiction of the United States to engage in any trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention, including the definitions of terms in article I thereof.

(2) Any importation into the United States of fish or wildlife shall, if --

(A) such fish or wildlife is not any endangered species listed pursuant to section 1533 of this title but is listed in Appendix II to the Convention,

(B) the taking and exportation of such fish or wildlife is not contrary to the provisions of the Convention and all other applicable requirements of the Convention have been satisfied,

(C) the applicable requirements of subsections (d), (e) and (f) of this section have been satisfied, and

(D) such importation is not made in the course of a commercial activity,

be presumed to be an importation not in violation of any provision of this chapter or any regulation issued pursuant to this chapter.

16 U.S.C. 1540. Penalties and enforcement

(b) Criminal violations

(1) Any person who knowingly violates any provision of this chapter, of

any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F), (a)(2)(A), (B), (C), or (D), (c), (d) (other than a regulation relating to recordkeeping, or filing of reports), (f), or (g) of section 1538 of this title shall, upon conviction, be fined not more than $50,000 or imprisoned for not more than one year, or both. Any person who knowingly violates any provision of any other regulation issued under this chapter shall, upon conviction, be fined not more than $25,000 or imprisoned for not more than six months, or both.

(2) The head of any Federal agency which has issued a lease, license, permit, or other agreement authorizing a person to import or export fish, wildlife, or plants, or to operate a quarantine station for imported wildlife, or authorizing the use of Federal lands, including grazing of domestic livestock, to any person who is convicted of a criminal violation of this chapter or any regulation, permit, or certificate issued hereunder may immediately modify, suspend, or revoke each lease, license, permit, or other agreement. The Secretary shall also suspend for a period of up to one year, or cancel, any Federal hunting or fishing permits or stamps issued to any person who is convicted of a criminal violation of any provision of this chapter of any regulation, permit, or certificate issued hereunder. The United States shall not be liable for the payments of any

compensation, reimbursement, or damages in connection with the modification, suspension, or revocation of any leases, licenses, permits, stamps, or other agreements pursuant to this section.

(3) Notwithstanding any other provision of this chapter, it shall be a defense to prosecution under this subsection if the defendant committed the offense based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual, from bodily harm from any endangered or threatened species.

16 U.S.C. 3372. Prohibited acts

(a) Offenses other than marking offenses

It is unlawful for any person --

(1) to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law;

(2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce --

(A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law, or

(B) any plant taken, possessed, transported, or sold in violation of any law or regulation of any State;

(3) within the special maritime and territorial jurisdiction of the United States (as defined in section 7 of title 18) --

(A) to possess any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law or Indian tribal law, or

(B) to possess any plant taken, possessed, transported, or sold in violation of any law or regulation of any State;

(4) to attempt to commit any act described in paragraphs (1) through (4).

16 U.S.C. 3373. Penalties and sanctions

(d) Criminal penalties

(1) Any person who --

(A) knowingly imports or exports any fish or wildlife or plants in violation of any provision of this chapter (other than subsections (b) and (d) of section 3372 of this title), or

(B) violates any provision of this chapter (other than subsections (b) and (d) of section 3372 of this title) by knowingly engaging in conduct that involves the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase, fish or

wildlife or plants with a market value in excess of $350,

knowing that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation, shall be fined not more than $20,000, or imprisoned for not more than five years, or both. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants.

(2) Any person who knowingly engages in conduct prohibited by any provision of this chapter (other than subsections (b) and (d) of section 3372 of this title) and in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner under, any underlying law, treaty or regulation shall be fined not more than $10,000, or imprisoned for not more than one year, or both. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants.

(3) Any person who knowingly

violates section 3372(d) of this title --

(A) shall be fined under title 18 or imprisoned for not more than 5 years, or both, if the offense involves --

(i) the importation or exportation of fish or wildlife or plants; or

(ii) the sale or purchase, offer of sale of purchase, or commission of an act with intent to sell or purchase fish or wildlife or plants with a market value greater than $350; and

(B) shall be fined under title 18 or imprisoned for not more than 1 year, or both, if the offense does not involve conduct described in subparagraph (A).